Supreme Court, U.S.
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No. 02-1403

In The

Supreme Court of the United States

MARVIN AND LYNN ST. GERMAIN, et al.,

Petitioners,

v.

U.S. HOME CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6 Respondent U.S. Home Corporation makes the following corporate disclosure: Lennar Corporation is the parent corporation of U.S. Home Corporation. No other publicly held company owns 10% or more of U.S. Home Corporation's stock.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the Honorable Chief Justice William H. Rehnquist and the Honorable Justices of the Supreme Court of the United States:

Respondent U.S. Home Corporation ("U.S. Home") respectfully submits the following Brief in Opposition to Marvin and Lynn St. Germain, *et. al.*'s ("Petitioners") Petition for Writ of Certiorari:

I. Introduction

The Petition for Writ of Certiorari should be denied because the Supreme Court lacks jurisdiction under 28 U.S.C. § 1257. Neither the California Supreme Court nor the lower appellate court issued a final judgment on a federal issue. Neither court framed or decided any of the questions that Petitioners argue. Petitioners request direct review in the United States Supreme Court of a decision of a California trial court. California's intermediate appellate court merely decided that review at this stage of the case is premature, and the California Supreme Court declined to intervene. Federal intervention, therefore, is also premature.

II. The Petition for Writ of Certiorari Should Be Denied Because It Is Premature

On motion of U.S. Home, the Superior Court of California ordered Petitioners to arbitrate certain claims. Appendix ("App.") 3a-7a. The Superior Court is California's trial court of general jurisdiction. *See* CAL. CONST. art. VI, §§ 4, 10. Petitioners sought appellate review of the

order by petitioning for a writ of mandate in the California Court of Appeal. App. 15a-22a. The Court of Appeal is California's intermediate appellate court. *See* CAL. CONST. art. VI, §§ 3, 11; CAL. CIV. PROC. CODE § 904.1(a). That court summarily denied the petition for writ of mandate. App. 2a. Petitioners sought review in the California Supreme Court. App. 23a-28a. The California Supreme Court reviews civil cases only in its discretion. *See* CAL. R. CT. 28. In exercising discretion, it applies criteria similar to those applied to petitions for certiorari. *Compare id.* at 28(b) (setting forth grounds for review by California Supreme Court) *with* SUP. CT. R. 10 (indicating the character of the "compelling reasons" required for review on a writ of certiorari). The California Supreme Court denied the petition for review. App. 1a.

An order compelling arbitration is not directly appealable under California law. *See* CAL. CIV. PROC. CODE §§ 1294, 1294.2; *Gordon v. G.R.O.U.P., Inc.*, 56 Cal.Rptr.2d 914, 918 n. 8 (Cal.Ct.App. 1996) *citing State Farm Fire & Cas. v. Hardin*, 259 Cal.Rptr. 433, 435-36 (Cal.Ct.App. 1989). The order compelling arbitration is, however, reviewable on appeal from the judgment entered on the arbitration award. *See* CAL. CIV. PROC. CODE § 906; *La Pietra v. Freed*, 151 Cal.Rptr. 554, 557 (Cal.Ct.App. 1978); *see also Atlas Plastering Inc. v. Superior Court*, 140 Cal.Rptr. 59, 61 (Cal.Ct.App. 1977) (preferred procedure following order compelling arbitration is to proceed with arbitration and "attack confirmation on appeal").

A party claiming to be aggrieved by a Superior Court order that is not directly appealable may petition the Court of Appeal for an extraordinary writ. *See* CAL. CIV. PROC. CODE § 1085. To persuade the Court of Appeal to consider the merits of the case, the petitioner must first

show that it has no adequate remedy by appeal and that it will suffer irreparable harm. *See Hoyga v. Superior Court*, 142 Cal.Rptr. 325, 329-30 (Cal.Ct.App. 1997). "A remedy will not be deemed inadequate merely because additional time and effort would be consumed by its being pursued through the ordinary course of the law." *Omaha Indem. Co. v. Superior Court*, 258 Cal.Rptr. 66, 67 (Cal.Ct.App. 1989). Unless the California Legislature has made a writ proceeding the exclusive means of reviewing a class of order, in the vast majority of cases "the parties must be relegated to a review of the order on appeal from the final judgment." *Oceanside Union School Dist. v. Superior Court,* 373 P.2d 439, 442 n. 4 (Cal. 1962); *see also Premium Comm'l Services Corp. v. National Bank of Calif.*, 86 Cal.Rptr.2d 65, 68-69 (Cal.Ct.App. 1999) (explaining why extraordinary writs are rarely granted). In California, ninety percent of writ petitions are denied. *See Premium Comm'l*, 86 Cal.Rptr.2d at 68 *quoting Omaha Indem. Co.*, 258 Cal.Rptr. at 68.

When the California Court of Appeal finds that a petition does not meet the criteria for immediate review, it denies the petition summarily. *See Kowis v. Howard*, 838 P.2d 250, 252 (Cal. 1992).[1] Summary denial of a writ petition does not create law of the case, support issue preclusion, or otherwise impair the petitioner's right to demand review of the merits of the challenged order on

[1] If the petition meets the threshold criteria, however, the Court of Appeal either may issue an order for the case to proceed or, in rare cases, may grant peremptory relief in the first instance. *See id.* In either circumstance, the case becomes a "cause" under the California Constitution, and the Court of Appeal must decide it in a reasoned, written opinion. *See id.*

direct appeal from the later judgment. *See Kowis*, 838 P.2d at 253; *Hoversten v. Superior Court*, 88 Cal.Rptr.2d 197, 200 (Cal.Ct.App. 1998). That is because summary denial signals only that (1) the petitioner failed to convince the Court of Appeal that an issue should be decided immediately; and (2) the appellate court has not given the merits full review. *See Kowis*, 838 P.2d at 253, 256.

As Petitioners' Appendix accurately reflects, the Court of Appeal summarily denied their petition for a writ of mandate, and the California Supreme Court exercised its discretion not to review the case. This means no California appellate court considered the first two questions in the Petition for Writ of Certiorari, and no decision of a California appellate court frames the third question. Petitioners remain free to appeal the judgment that will be entered after arbitration. *See* CAL. CIV. PROC. CODE § 1294. In that appeal, they can challenge the order compelling arbitration on the grounds they now argue. *See Kowis*, 838 P.2d at 253; *Gordon*, 56 Cal.Rptr.2d at 918 n. 8; *State Farm*, 259 Cal.Rptr. at 435-36.

In the end, Petitioners seek United States Supreme Court examination of the California Court of Appeal's decision not to engage in discretionary interlocutory appellate review.[2] How state courts regulate the timing of

[2] Petitioners misstate the legal effect of the California Supreme Court's denial of their petition for review. Petitioners assert that "[t]he California Supreme Court decided, by denying petition for review, that [sales of newly constructed single family homes] do involve interstate commerce,. . . . " Pet. 5. By denying the petition for review, however, the California Supreme Court merely left untouched the California Court of Appeal's decision not to engage in discretionary interlocutory appellate review.

appellate review in ordinary civil actions, however, raises no federal question. Considering the merits of Petitioners' questions is therefore premature, so much so that this Court lacks jurisdiction. *See* 28 U.S.C. § 1257; *Pierce County, Washington v. Guillen*, ___ U.S. ___, 123 S.Ct. 720, 728, 154 L.Ed.2d 610, 623 (Jan. 2003) and cases there cited. This case lacks a final judgment by California's highest court on Petitioners' purported federal issues.

III. Conclusion

For the reasons set forth in this Brief in Opposition, Respondent U.S. Home Corporation respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioners Marvin and Lynn St. Germain, *et al.*

Respectfully submitted,

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